(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

DATE: OCT 2 9 2013 OFFICE: TEXAS SERVICE CENTER

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the AAO on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions with post-baccalaureate experience equivalent to an advanced degree. The petitioner seeks employment as an elementary school teacher and STEM (science, technology, engineering and mathematics) coordinator for The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions with the defined equivalent of an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions with the defined equivalent of an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990, P.L. 101-649, 104 Stat. 4978 (Nov. 29, 1990), published at 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

In re New York State Dept of Transportation, 22 I&N Dec. 215, 217-18 (Act. Assoc. Comm'r 1998) (*NYSDOT*), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, a petitioner must establish that the alien seeks employment in an area of substantial intrinsic merit. *Id.* at 217. Next, a petitioner must establish that the proposed benefit will be national in scope. *Id.* Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. *Id.* at 217-18.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. *Id.* at 219. The petitioner's assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The term "prospective" is included here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative. *Id.*

The USCIS regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on January 13, 2012. In an accompanying statement, counsel stated:

> [The petitioner's] petition for waiver of the labor certification is premised on her Masters Degree equivalent in Elementary Education, about (20) years of dedicated and progressive teaching experience exclusively in Elementary Education . . . and the awards and recognitions received by her.

Academic degrees, experience, and recognition for achievements and contributions are elements that can contribute toward a finding of exceptional ability. *See* 8 C.F.R. §§ 204.5(k)(3)(ii)(A), (B), and (F), respectively. Exceptional ability, in turn, is not self-evident grounds for the waiver. *See* section 203(b)(2)(A) of the Act.

Counsel's introductory statement continued:

> From 2007 to 2011, [the petitioner] was instrumental in raising dramatically the scores and proficiency of her students in the Maryland State Assessment [MSA] Tests (Math and Reading). On top of these, he [*sic*] has been serving as Science, Technology, Engineering and Mathematics (STEM) coordinator for since 2004 and from 2006 to present [as] STEM Fair Chairperson.
>
> It is worth noting that [the petitioner] has exceptional ability and proficiency as a curriculum writer for the schools [where] she has taught which she obtained over time through diligent efforts in completing various training programs provided and administered by the in Maryland.
>
> But for the unfortunate incident that happened to the the school system and the entire nation as a whole remain in need of the professional services of [the petitioner] as a teacher and leader in Science, Technology, Engineering and Mathematics (STEM).

Counsel did not identify or describe "the unfortunate incident," but it is a matter of public record that the U.S. Department of Labor invoked the debarment provisions of section 212(n)(2)(C)(ii) of the Act against owing to certain immigration violations by that employer. As a result, between March 16, 2012 and March 15, 2014, USCIS cannot approve any employment-based immigrant or nonimmigrant petitions filed by

Before the debarment occurred, filed a Form I-140 petition on the beneficiary's behalf on May 29, 2009, with an approved labor certification filed on July 28, 2008. The Texas Service Center approved that petition on July 9, 2009, classifying her as a professional under section 203(b)(3) of the Act. By applying for the national interest waiver, the petitioner has sought an exemption from a requirement that she has already met.

Much of the initial submission consisted of letters from administrators, teachers, a student, and relatives of students. These witnesses attested to the petitioner's skills as a teacher and administrator. principal of stated that the petitioner "[s]erves as the Science Coordinator" and handles the annual STEM Fair, but she did not indicate that the petitioner teaches STEM subjects. Rather, she "is assigned to teach third grade Reading, Oral and Written

[1] The list of debarred employers is available online at http://www.dol.gov/whd/immigration/H1BDebarment.htm (printout added to record August 7, 2013).

Communication and Social Studies," and "[p]articipated as a CURRICULUM WRITER for Reading Department in preparation of Elementary Curriculum Frameworks for Grade Three" (emphasis in original). Ms. noted improvement on Math MSA scores at from 2007 to 2009 (with a slight decline in 2010), but did not indicate the extent to which the petitioner (who is not a mathematics teacher) was responsible for the improvement. Other witnesses offered general praise for the petitioner's skills as an educator, but no indication that her work has had, or is likely to have, a significant impact beyond the districts that have employed her.

Regarding the petitioner's work on writing the reading curriculum framework, the record shows that the petitioner was one of 35 contributing writers. More than one witness letter indicated that the "frameworks are essential to support teachers throughout ' but did not indicate that the impact or influence of the work extended beyond the county school system.

The petitioner submitted copies of several certificates of recognition, appreciation, and accomplishment, all of them apparently recognizing local-level achievements, such as meeting mandated progress goals, "Participation in the ' and "being the most outstanding library user of the year." The petitioner participated as a ' ' in the ' Japan, in 1994, while she was a graduate student at but there is no evidence that this program related to her work as an educator.

In a request for evidence (RFE) dated May 1, 2012, the director instructed the petitioner to submit documentary evidence to meet the guidelines set forth in *NYSDOT*. The director acknowledged the petitioner's submission of award certificates, and requested further evidence to establish their significance.

In response, counsel stated:

> Since a 'National Special Education Teacher' is not even a real concept but more of metaphysical cognition [*sic*], undersigned wishes to once again posit a realistic proposition upon which to establish that the self-petitioner's contributions will impart national-level benefits.
>
> Even authors of books, treatises and other academic materials on Special Education are not in any standing [*sic*] to claim that their contributions are national in scope since not all special education teachers can be said to utilize their works.
>
> Further, the curriculums used by each state education department in the United States vary from each other.

Counsel referred to the petitioner as a special education teacher, and discussed background information specific to special education teachers. The petitioner, however, did not initially claim to be a special

education teacher, and witness letters from faculty did not refer to her as such. The petitioner claimed some academic training in special education, but there is no evidence that employs her as a special education teacher, or intends to do so in the future. Therefore, the petitioner has not established the relevance of the information regarding special education teachers.

The director did not require that the petitioner show that she is "a 'National Special Education Teacher,'" or that "all special education teachers . . . utilize [her] works." National scope is not the same as universal reliance on the petitioner's work.

Counsel asserted that different jurisdictions use different curricula. The record demonstrates this fact, the petitioner having served on a local curriculum committee. This assertion, however, is not a factor in favor of granting the waiver. Instead, it serves to emphasize the local nature of the petitioner's impact, as stated in *NYSDOT*'s discussion of the "national scope" prong of the national interest test: "while education is in the national interest, the impact of a single schoolteacher in one elementary school would not be in the national interest for purposes of waiving the job offer requirement of section 203(b)(2)(B) of the Act." *Id.* at 217 n.3.

Citing previously submitted statistics, counsel noted that students MSA test scores improved during the petitioner's time at that school. This improvement does not show that the petitioner was responsible for the improvement at and there is no evidence that her efforts at that one school have improved scores on a wider scale or will do so in the future. The available information is consistent with the director's assertion that the petitioner's impact is local.

Counsel stated: "it is but harmless to assert that if an NIW Petition is made with premise on some prevailing Acts of United States Congress, that by itself renders the proposed employment national in scope." All employment-based immigrant classifications are based on "prevailing Acts of United States Congress," and so is the statutory job offer requirement. Congress could supersede this requirement by passing new legislation specifically exempting special education teachers from the job offer requirement, but counsel did not show that Congress has in fact done so. Instead, counsel claimed that other legislation implies such an exemption even though that legislation does not mention immigration. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel quoted remarks made by then-President George H.W. Bush when he signed the Immigration Act of 1990, which created the national interest waiver: "This bill provides for vital increases for entry on the basis of skills, infusing the ranks of our scientists and engineers and educators with new blood and new ideas." Counsel interpreted this passage to mean that Congress created the national interest waiver for educators. The Immigration Act of 1990, however, was not restricted to the creation of the waiver. It was, rather, a comprehensive bill that, among other things, expressly subjected members of the professions to the job offer requirement, and defined school teaching as a profession. *See* sections 203(b)(2)(A) and 101(a)(32) of the Act. The petitioner has

not established that the former President's general comments about the Immigration Act of 1990 as a whole should be construed as being specific to the national interest waiver provisions.

Counsel cited other legislation and court cases, all of which affirmed the importance of education but none of which exempted teachers from the job offer requirement at section 203(b)(2)(A) of the Act.

When discussing education-related legislation, counsel referred to the No Child Left Behind Act (NCLBA), Pub.L. 107-110, 115 Stat. 1425 (Jan. 8, 2002), which prioritized the hiring of "Highly Qualified Teachers." The NCLBA contains no provision relating to the national interest waiver or modifying the immigration provisions already in effect for teachers as members of the professions. Counsel stated-, correctly, that the "United States Congress does not restrict 'highly qualified teachers' to prove that they can 'serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.'" This statement, though correct, does not establish that individuals who meet the definition of "Highly Qualified Teachers" under the NCLBA are entitled to the national interest waiver.

Counsel contended that "the Inherent Right to Privacy by Available U.S. Workers impedes [the petitioner] from squarely complying with the [*NYSDOT*] mandate." Counsel's contention rests on the incorrect assumption that the *NYSDOT* guidelines consist of an item-by-item comparison of the petitioner's credentials with those of qualified United States workers. The key provision in *NYSDOT* is that the petitioner must establish a record of influence on the field as a whole. *Id.* at 219, n.6. This does not require a comparison of other teachers' credentials.

Counsel claimed that the labor certification process poses a "dilemma" for the petitioner because she possesses qualifications above the bare minimum required for the job she seeks, and therefore "the United States Department of Labor would . . . most likely recommend denial of the application" for labor certification. The Department of Labor, however, has already approved a labor certification for the petitioner.

Counsel stated that another [redacted] teacher received a national interest waiver, and asked that the present petition "be treated in the same light." While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished service center decisions are not similarly binding. Furthermore, counsel has furnished no evidence to establish that the facts of the instant petition are similar to those in the unpublished decision.

The director denied the petition on September 24, 2012. The director noted that a shortage of workers in a given profession is not grounds for a waiver of the job offer requirement.[2] The director stated that the petitioner had not established wider influence in her field, or otherwise distinguished herself to an extent that would warrant approval of the waiver.

[2] A limited exception for certain physicians, described at section 203(b)(2)(B)(ii) of the Act and the USCIS regulations at 8 C.F.R. § 204.12, is not applicable in this proceeding.

On appeal, counsel contends "the Director is requiring more from the beneficiary's credentials tantamount to having exceptional ability," even though one need not qualify as an alien of exceptional ability in order to receive the waiver. It is evident from the statute that the threshold for exceptional ability is below, not above, the threshold for the national interest waiver. Also, the director did not require the petitioner to establish exceptional ability in her field. Instead, the director found that the petitioner's evidence failed to establish that her work has had an influence beyond the school districts where she has worked.

Counsel states that the petitioner's positive impact on her students, "who are future U.S. workers and thus equally protected by labor certification process," warrants waiving that process in her own case. Counsel states:

> [T]he most tangible national benefit to be derived from a 'Highly Qualified Special Education Teacher' is recreating a society of responsible and values-driven citizens including a highly productive and well-balanced work force that would translate the current recession adversely affecting the United States of America into a formidable economy again including national security.

Counsel does not explain how the actions of one teacher would contribute significantly to nationwide social reform and economic recovery. General assertions about the overall importance of education, and the need for education reform, do not exempt every teacher from the job offer requirement. As members of the professions (as defined in section 101(a)(32) of the Act), teachers are subject to the job offer/labor certification requirement set forth in sections 203(b)(2)(A) and (3)(C) of the Act. Likewise, aliens of exceptional ability who "will substantially benefit prospectively . . . the United States" are also subject to the job offer provision of section 203(b)(2)(A) of the Act. Congress created no blanket waiver for teachers. Accordingly, an intending immigrant who works in a beneficial profession such as teaching is not automatically exempt from the job offer requirement.

Counsel contends the benefit arising from the petitioner's local work "spreads to the entire nation's economy and security," and that "a single 'Highly Qualified Teacher' can inspire a national figure such as a President, a legislator, a member of the judiciary, a scientist, among others." Speculation that one of the petitioner's students may rise to prominence is not a basis for a blanket waiver for teachers.

Counsel cites a report documenting a high attrition rate among special education teachers. By design, conditions where demand exceeds supply are favorable toward labor certification. Counsel's assertion that the petitioner "is one of the 92% [of] special educators with full certification" does not distinguish the petitioner from her peers.

Counsel quotes various current and former political leaders regarding the importance of education, but does not show that the quoted passages relate to or resulted in statutory provisions that exempt teachers from the job offer requirement.

Counsel repeats the assertion that labor certification poses a "dilemma" for the petitioner, because the Department of Labor requires only a bachelor's degree, whereas "the employer is required by No Child Left Behind . . . to employ highly qualified teachers." Counsel does not explain how these two considerations are incompatible. Section 9101(23) of the NCLBA defines the term "highly qualified teacher." By the statutory definition, a "highly qualified" school teacher:

- has obtained full State certification as a teacher or passed the State teacher licensing examination, and holds a license to teach in such State;
- holds at least a bachelor's degree; and
- demonstrates competence in the academic subjects he or she teaches.

Section 9101(23)(A)(ii) of the NCLBA further indicates that a teacher is not "Highly Qualified" if he or she has "had certification or licensure requirements waived on an emergency, temporary, or provisional basis." Counsel does not explain how the above requirements are incompatible with the existing labor certification process. The minimum degree requirement, which counsel has emphasized, is the same for labor certification as it is for a highly qualified teacher (*i.e.*, a bachelor's degree). Furthermore, the Department of Labor already has approved a labor certification on the petitioner's behalf.

Counsel asserts: "Exclusively and strictly enforcing the rudiments behind the New York State Department of Transportation Case to Highly Qualified Teachers is unjust, unreasonable and damaging to the 'Best Interest' of the American School Children." Precedent decisions are binding on all USCIS employees in the administration of the Act. *See* 8 C.F.R. § 103.3(c). Counsel cites no statute, regulation or case law that would require or permit USCIS to disregard *NYSDOT* as it applies to school teachers. Counsel attempts to distinguish the present matter from *NYSDOT* by observing that the beneficiary in *NYSDOT* was a bridge engineer who, unlike the petitioner, worked with inanimate objects rather than people. Counsel cites no legal basis for this distinction. The *NYSDOT* decision mentions school teachers at 217 n.3.

As is clear from a plain reading of the statute, engaging in a profession (such as teaching) does not presumptively exempt such professionals from the requirement of a job offer based on national interest. Congress has not established any blanket waiver for teachers. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The petitioner has not established a past record of achievement at a level that would justify a waiver of the job offer requirement. The petitioner need not demonstrate notoriety on the scale of national acclaim, but the national interest waiver contemplates that her influence must be national in scope. *NYSDOT* at 217, n.3. More specifically, the petitioner "must clearly present a significant benefit to the field of endeavor." *Id.* at 218. *See also id.* at 219, n.6 (the alien must have "a past history of demonstrable achievement with some degree of influence on the field as a whole.").

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The AAO will dismiss the appeal for the above stated reasons. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed.